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September 8, 2000

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
The Portals - TW-A325
445 Twelfth Street, S.W.
Washington, D.C. 20554

RECEIVED

SEP 8 2000

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

**Re: In the Matter of Annual Assessment of the Status of Competition in Markets
for the Delivery of Video Programming, CS Docket No. 00-132**

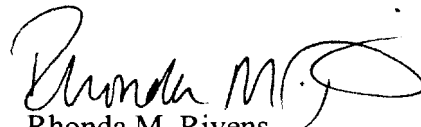
Dear Ms. Salas:

On behalf of EchoStar Satellite Corporation ("EchoStar"), enclosed please find for filing an original and nine (9) copies of EchoStar's Comments in the above-referenced matter.

Also enclosed is an additional copy of EchoStar's Comments, which we ask you to date-stamp and return with our messenger.

If you have any questions, please do not hesitate to contact me.

Sincerely,


Rhonda M. Rivens
Counsel for EchoStar
Satellite Corporation

Enclosures

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List A B C D E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of)

Annual Assessment of the Status of)
Competition in Markets for the)
Delivery of Video Programming)

CS Docket No. 00-132

COMMENTS OF ECHOSTAR SATELLITE CORPORATION

EchoStar Satellite Corporation ("EchoStar") hereby submits its Comments in response to the above-captioned Notice of Inquiry released by the Commission on August 1, 2000.¹ The Notice requests comments on the status of competition in the markets for delivery of video programming. EchoStar is a multichannel video programming distributor ("MVPD") providing Direct Broadcast Satellite ("DBS") service to subscribers throughout the United States. It currently operates 5 DBS satellites, with a sixth already launched and soon to commence commercial operations. EchoStar also plans to launch additional satellites. As of June 2000, EchoStar's DISH Network programming served more than 4.3 million households.

Effective competition has yet to arrive in the MVPD markets. Even though the increases in DBS subscribers have confirmed that DBS services are perhaps the only truly viable alternative to cable at this time, cable operators still dominate most MVPD markets. To EchoStar's knowledge, the increases in DBS subscriber counts over the past year have not been accompanied by corresponding decreases in the number of cable subscribers or by substantial erosion of cable market shares. In particular, cable operators preserve their stranglehold in urban areas. And while the Commission has made a number of

¹ *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 00-132 (rel. Aug. 1, 2000) ("Notice" or "NOI").

"effective competition" findings in various cable community units, these findings represent but a "drop in the ocean" -- a small percentage of the total number of communities nationwide. Indeed, the absence of more effective competition determinations in itself is strong evidence of the continuing market power of incumbent cable operators. This continued dominance is largely due to a vicious circle of self perpetuation: cable operators continue to enjoy unfair or unlawful advantages that are in turn due to the cable operators' market power itself. These advantages include preferential access to cable programming, including unaffiliated programming. Cable dominance threatens to be further exacerbated by the aggressive roll-out of broadband capability and services by large MSOs, which, in AT&T's case, can be subsidized from its long-distance business.

The Commission should be sensitive to the fact that, despite the significant increase in EchoStar's subscriber count, there are still huge discrepancies in the terms on which programming is made available to EchoStar and those enjoyed by cable operators -- discrepancies not due to any legitimate competitive factors such as cost savings or volume discounts. These disparities extend to the programming of unaffiliated vendors, including some of the most coveted cable programming properties. EchoStar acknowledges the statutory limitations inherent in certain aspects of the program access rules -- the required prohibitions on discrimination and exclusivity reach only affiliated programming. At the same time, the Commission is far from powerless to tackle these serious problems, and may do so in two ways. First, the Commission has available to it the "catch-all" unfair practices prohibition, which captures all types of unfair conduct by cable operators, including the exercise of "oligopsony" pressures to secure preferential terms from programmers. Second, the Commission should use its ample condition authority to attach conditions to its approval of the recent, and itself disconcerting, wave of transactions involving control over content by increasingly fewer entities.

The Commission should also be aware of further significant distortions that have transpired in the video delivery markets. DIRECTV, the DBS operator with by far the largest subscriber base, has engaged in various types of anti-competitive conduct that have caused EchoStar to resort to the federal district court in Colorado asserting several claims under the antitrust laws.² The antitrust courts, and not this Commission, are the appropriate forum for evaluating these claims. At the same time, EchoStar believes that the Commission should apply the unfair practices provision to exclusive programming deals with any MVPD consistent with its admonition in the 1994 decision where the Commission declined to prohibit such agreements outright. It is DIRECTV's exclusivity deals with the sports leagues that constitute one of the most significant impediments to the promotion of stronger competition in the MVPD market.

I. CABLE OPERATORS CONTINUE TO DOMINATE THE MVPD MARKET

Incumbent cable operators clearly continue to dominate the MVPD market. This market power is evident not only from the predominant share of MVPD subscribers served by cable operators, but also from the continuing cable rate increases and the relatively few determinations that the FCC has made to date finding effective competition in particular cable franchises. In short, cable operators still exert an unacceptably high degree of market power – which in turn enables them to dominate the programming market, in many instances extracting anti-competitive terms and conditions from both affiliated *and unaffiliated* programmers. It is thus imperative that the Commission continue to take steps to curb the market power of cable operators and to limit the anticompetitive effects of such market power.

Any slight erosion in the market share of cable operators in the past year has not been significant enough to blunt cable operators' ability to raise cable rates and wield excessive influence over MVPD

² *EchoStar Communications Corp., et al. v. DIRECTV Enterprises, et al.*, Civil Docket Case No. 00-CV-212 (D.Colo.) (filed Feb. 1, 2000).

programmers – two clear indications of unrestrained market dominance. In short, as the Commission stated just a few months ago:

The market for the delivery of video programming to households continues to be highly concentrated and characterized by substantial barriers to entry. While competitive alternatives to an incumbent “wireline” MVPD, i.e., a cable or OVS operators, are developing and attracting an increasing proportion of MVPD subscribers, most consumers have limited choice among video programming distributors.³

The statistics remain telling. Cable operators continue to command the preponderance of MVPD subscribers: recent estimates predict that cable operators will claim 81.4 percent of the MVPD market for the year 2000.⁴ And, as the Supreme Court has held, “[t]he existence of [monopoly] power ordinarily may be inferred from the predominant share of the market.”⁵ While the cable industry’s market share has slipped marginally (about 1%), this decline is not nearly enough to demonstrate a loss of market power.⁶ This is particularly true in a market that is characterized by chronic price increases and extremely high barriers to entry.⁷

³ *In the Matter of Annual Assessment of Competition in the Markets for the Delivery of Video Programming*, Sixth Annual Report, 15 FCC Rcd. 978, ¶ 140 (2000) (“1999 Report”).

⁴ “Domestic Multichannel Video Subscriber Summary,” *Cable World* (July 17, 2000) (providing MVPD subscriber estimates derived from Paul Kagan Associates Inc., Ladenburg Thalmann & Co. Inc. and NCTA).

⁵ *United States v. Grinnell Corp. et al.*, 384 U.S. 563 (1966) (citing *United States v. du Pont & Co.*, 351 U.S. 377, 391 (1956)). See also *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946) (holding over 80% of the market constituted a substantial monopoly).

⁶ See e.g., *Walter L. Reazin, M.D., et al. v. Blue Cross and Blue Shield of Kansas, Inc.*, 899 F.2d 951, 970 (10th Cir. 1990) (“A declining market share . . . does not foreclose a finding of [market] power.”) (quoting *Oahu Gas Serv. v. Pacific Resources, Inc.*, 838 F. 2d 360, 366-67 (1990)).

⁷ See e.g., *id.* at 967-971; See also, *Syufy Enterprises v. American Multicinema, Inc., et al.*, 793 F.2d 990 (9th Cir. 1986) (holding that even a 60-69% market share, taken together with barriers to entry and other factors, supported a finding of market power).

The MVPD market is indeed plagued with chronic price increases. Notably, the recent increases that the cable industry has inflicted on consumers have been significant enough to lead the Chairman of the House Judiciary Committee, Rep. Henry Hyde, to ask the Commission to investigate cable competition and to seek advice on whether rate regulation should be reinstated.⁸

The MVPD market also remains characterized by significant barriers to entry. This is evident in the relatively few findings of "effective competition" that the Commission has made for cable franchises throughout the country. As of last January, the Commission reported 157 such findings – out of a total of 33,000 cable community units nationwide.⁹ The intervening months have produced only fourteen more. In other words, the Commission has affirmatively found effective competition to exist in less than 1% of the country. Moreover, recent estimates show that the overall market share of non-DBS competitors is estimated to decline, not grow, over the next two years (from 1.2% in 1999 to less than 1% in 2002).¹⁰ Such an estimate should greatly concern the Commission.

Cable dominance may be further exacerbated by the aggressive roll-out of broadband capability and services by the large MSA. Indeed, only a few weeks ago, AT&T announced its plan to aggressively subsidize these services from its massive pool of long distance revenues, exploiting yet another unfair advantage that DBS operators like EchoStar simply cannot match.¹¹

⁸ See e.g., "Hyde Rips Cable Rate Hikes," *Chicago Sun-Times* (July 21, 2000); "Key Legislator Pushing for Review of Cable Rates," *The Atlanta Journal and Constitution* (July 20, 2000); "37 Cities Face Cable Hikes," *The Dallas Morning News* (May 13, 2000).

⁹ 1999 Report, ¶ 140.

¹⁰ "Domestic Multichannel Video Subscriber Summary," *Cable World* (July 17, 2000) (providing MVPD subscriber estimates derived from Paul Kagan Associates Inc., Ladenburg Thalmann & Co. Inc. and NCTA).

¹¹ Farrell, Mike, "AT&T Delights by Wrapping Up Excite," *MultiChannel News* (Sept. 4, 2000) ("AT&T has been scrambling to meet its year-end goal of 500,000 cable-telephony customers . . . and
(Continued ...)

In short, there is clearly still insufficient competition in the MVPD market. The Commission should continue to take steps to curb the market power of incumbent cable operators.

III. THE COMMISSION MUST TAKE STEPS TO LIMIT THE PERNICIOUS EFFECTS OF MARKET POWER IN THE MVPD MARKET

One of the most pernicious effects of cable's market power is the cable industry's unparalleled buying power in the market for video programming. As EchoStar and other non-incumbent cable MVPDs have informed the Commission in the past, such MVPDs face significant difficulties in obtaining fair, non-discriminatory access to programming from programmers.¹² This problem is not limited to cable-affiliated programmers: based on their overwhelming buying power in the programming market, cable operators command discriminatory treatment at the expense of competing distributors from unaffiliated programmers as well. EchoStar's ability to compete against cable operators for scarce programming is dwarfed by the millions of pairs of eyes that a large cable operator can offer a programmer, and its resulting leverage. The Commission acknowledged this in its 1999 Report, observing that "because programmers have an incentive to minimize transaction costs by obtaining carriage on a single large MSO, thereby gaining access to the large number of subscribers which are needed for viability, larger MSOs have *significant* bargaining power. . . ." ¹³ As a result, the Commission concluded that "[n]oncable MVPDs . . . continue to

expected to start a special promotion in several large cities last Friday, offering up to five free months of local and long-distance telephone service.").

¹² See, e.g., 1999 Report at ¶ 50 (citing comments of CCC, a coalition of wireline and wireless overbuilders); *Id.* at ¶ 91 (citing comments of Wireless Communications Association that program access difficulties present a barrier to MVPD market entry for MMDS operators).

¹³ *Id.* at ¶ 177 (emphasis added).

experience some difficulties in obtaining programming from both vertically integrated cable programmers and unaffiliated programmers who continue to make exclusive agreements with cable operators.”¹⁴

This significant bargaining power continues to present a barrier to entry in the MVPD market and continues to undermine competition. As the Commission has previously instructed:

[I]f one entity has sufficient market power to exclude others from being able to obtain programming, or to force others to obtain programming at discriminatory prices, then this entity could seriously undermine competition in both the supply of programming and its distribution.¹⁵

Thus, the Commission cannot leave unaddressed the fact that certain entities have sufficient market power to force other MVPDs to obtain programming at discriminatory prices. Such discrimination is rampant, and the Commission cannot ignore the effect on competition.

In addition, the continuing consolidation of the cable industry may be expected to dramatically exacerbate cable's dominance. In its 1999 Report, the Commission noted the prevalence of “clustering” as reflected by the announcement of several significant transactions, including the AT&T-Media One, Adelphia-Century and Comcast-Jones Intercable mergers, that would result in even larger cable MSOs with even greater buying power.¹⁶

EchoStar recognizes that the Commission is somewhat constrained by the limited reach of the discrimination and exclusivity provisions of the program access law, which do not address the anti-

¹⁴ *Commission Adopts Sixth Annual Report on Competition in Video Markets*, News Release, CS Docket No. 99-230 (rel. Jan. 14, 2000).

¹⁵ *In the Matter of United States Satellite Broadcasting Co., Inc., Transferor, and DIRECTV Enterprises, Inc., Transferee*, Order and Authorization, DA 99-633, 14 FCC Rcd. 4585, 4590 (1999) (“USSB”) (emphasis added).

¹⁶ See 1999 Report at ¶ 166.

competitive behavior of unaffiliated programmers or programming transmitted via terrestrial means.¹⁷

However, the Commission is not powerless to address anti-competitive behavior in the program access area. The Commission has two tools within its ready reach to remedy the problems associated with the cable systems' growing market power in the programming market and discrimination by unaffiliated programmers. First, the Commission may address anti-competitive behavior through the unfair practices provision of the Communications Act.¹⁸ That provision is broader than the specific prohibitions on discrimination and exclusivity in that it prohibits unfair practices by cable operators regardless of whether they involve affiliated programmers. This ought not to be a controversial point – the Commission has recognized that the unfair practices prohibition can reach exclusive contracts that do not fall within the specific prohibition on exclusivity.¹⁹ By living up to this recognition and putting teeth in the enforcement of the prohibition on unfair practices, the Commission can make efforts to address the adverse effect of anti-competitive practices with which the Commission is well familiar, such as price discrimination, outright refusals to deal by unaffiliated programmers, and switching from satellite to terrestrial delivery to avoid imposition of the Commission's program access rules.

¹⁷ See 47 U.S.C. § 548(c).

¹⁸ See 47 U.S.C. § 548(b); see also *In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd. 3359, 3362-63 (acknowledging that Section 628(b) of the Communications Act [47 U.S.C. § 548(b)] could apply to a cable operator or satellite broadcast programmer "even if they are not vertically integrated.")

¹⁹ *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, 10 FCC Rcd. 3105, 3126 (1994).

Second, the Commission must appropriately condition proposed mergers involving control of programming content in the MVPD market.²⁰ Such conditions should be aimed at reducing pressure (individual or collective) on independent programmers, as well as discrimination by affiliated programmers. At a minimum, these conditions should prohibit all exclusive arrangements between a cable operator and a programming vendor, irrespective of whether the vendor is vertically-integrated or independent.

In the same vein, the Commission should also be aware of further significant distortions in the video delivery markets. In particular, DIRECTV has engaged in various types of anti-competitive conduct, which EchoStar has raised in a complaint brought under the antitrust laws in federal district court in Colorado. While the antitrust courts, and not this Commission, are the appropriate forum for evaluating these claims, EchoStar believes that the Commission should subject to competitive scrutiny exclusive programming agreements involving any MVPDs. As noted above, it is DIRECTV's exclusivity deals with the sports leagues that constitute one of the most significant impediments to the promotion of stronger competition in the market.

Thus, the Commission should apply the unfair practices provision of the program access rules to exclusive programming agreements involving MVPDs. Although the Commission previously declined to prohibit such agreements *per se*, the Commission stated that this decision "does not foreclose all remedies to an MVPD that claims to be aggrieved by an exclusive contract between a non-cable MVPD and a vertically integrated satellite cable programming vendor."²¹ As the Commission explained:

²⁰ Cha, Ariana Eunjung and Stern, Christopher, "2 Agencies Hovering Over AOL Deal; FCC, FTC Getting Closer in Views of Time Warner Merger," *Washington Post* (Sept. 6, 2000) (noting that AT&T, Time Warner and AOL are all entangled in a web of ownership connections as well as joint marketing and promotion agreements, which are all under federal regulatory scrutiny).

²¹ *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, 10 FCC Rcd. 3105, 3126 (1994).

[W]e previously determined that while [the unfair practices provision] does not specify types of 'unfair' practices that are prohibited, it 'is a clear repository of Commission jurisdiction to adopt additional rules or to take additional action to accomplish statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to broader distribution of satellite cable and broadcast programming.' The Commission did not sanction exclusive contracts between non-cable MVPDs and vertically integrated cable programming vendors, thus leaving open the possibility that such contracts could be challenged on the basis that they involve non-price discrimination or unfair practices.²²

In short, the Commission can and should address anti-competitive practices that have "emerge[d] as barriers to competition and obstacles to broader distribution of satellite cable and broadcast programming," such as DIRECTV's exclusivity deals with sports leagues.


IV. CONCLUSION

EchoStar urges the Commission to take action consistent with the foregoing comments.

Dated: September 8, 2000

Respectfully submitted,

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²² Id. at 3127 (quoting *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd. 3359, 3374 (1993)); see also *In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Systems*, 11 FCC Rcd. 18223, 18318-19 (1996) (noting that although the Commission had declined to broaden the program access rules to cover exclusive contracts between a DBS operator and vertically integrated satellite cable programmers, "it did not preclude the petition or any other aggrieved party from seeking relief from such contracts through other appropriate provisions of Section 628.")